

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1558

CACH, LLC

vs.

YUE FANG.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Defendant Yue Fang appeals from a judgment for the plaintiff, CACH, LLC (CACH), following a jury-waived trial in the Superior Court. On appeal he claims the judge's factual findings were not supported by admissible evidence. We affirm.

On review of a jury-waived proceeding, "[t]he judge's findings will not be set aside 'unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'" Mass. R. Civ. P. 52 (a), as amended, 423 Mass. 1402 (1996). . . . The burden rests on the appellant to show such an error." Commonwealth v. Source One Assocs., 436 Mass. 118, 124 (2002).

The judge made the following factual findings. Fang entered into an agreement with Citibank, N.A. (Citibank), for the extension of credit through the use of a credit card. Fang

made purchases using that credit card in August and September, 2011. Credit card statements were mailed to Fang at his long-standing address. After making one payment on the card in August, 2011, Fang failed to make any more payments on the card. As a result of Fang's failure to make the required monthly payments, the card was "charged off" in April, 2012, with a balance due of \$34,771.70. Citibank's contractual rights as to Fang's account were sold and assigned to CACH on June 27, 2014. In February, 2016, CACH brought this action against Fang to collect monies owed. At trial two exhibits were admitted in evidence: Citibank credit card statements bearing (a) Fang's name and mailing address, and (b) a summary of purchases, fees, and interest; and the bill of sale and assignment of debt from Citibank to CACH. Two witnesses testified at trial, Fang and Victoria Mason, the keeper of the records and authorized agent of CACH. Judgment entered in favor of CACH against Fang in the amount of \$34,771.70.

On appeal, Fang contends that the judge erred in admitting in evidence the bill of sale and assignment of debt from Citibank to CACH to prove CACH's status as assignee. For this argument, he relies on matters that he claims Mason did not state in her testimony at trial. However, Fang specifically declined to order a transcript and, in the absence of a trial transcript, we cannot find that any of the judge's findings are

clearly erroneous. Accordingly, the argument is waived. See O'Meara v. Doherty, 53 Mass. App. Ct. 599, 605-606 (2002). See Mass. R. A. P. 16 (a), as appearing in 481 Mass. 1628 (2019).¹ See also Mass. R. A. P. 9 (d) (2) (A), as appearing in 481 Mass. 1615 (2019). Even if the argument were not waived, we would find it unpersuasive on the limited record before us. The assignment of the right to payment of Fang's debt was fairly established by the signature on the written instrument by which Citibank's right to performance by Fang was extinguished and CACH acquired a right to such performance. See Restatement (Second) of Contracts § 317 (1981). See also A.J. Props., LLC v. Stanley Black & Decker, Inc., 469 Mass. 581, 586 (2014) (assignment of debt effected by assignor's demonstrated intention to transfer it).

Similarly, Fang asserts that the judge erred in admitting in evidence the Citibank credit card statements, contending they were not properly authenticated and in any event insufficient to prove his identity as the debtor. Notwithstanding the failure to provide an adequate record, Fang's identity as the debtor is fairly established on the limited record before us. Bills and statements bearing his name were sent to him at the address where he admitted he lived in his answer to the complaint.

¹ "Although [the appellant is] acting pro se, he nevertheless [is] bound to comply with the governing court rules." Rothman v. Trister, 450 Mass. 1034, 1034 (2008).

Fang additionally asserts that there was an absence of proof as to the contract between Fang and Citibank. The document admitted at trial does not contain his signature. As stated supra, in the absence of a transcript, we are unable to review this claim.² We note, however, that by using the credit card and making a payment on the debt incurred by such use, Fang manifested agreement to contract with Citibank, and the agreement was supported by valid consideration. See Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 780 (2006), and cases cited (credit card transaction is itself a contract).

Fang also challenges the judge's ruling that CACH is not a debt collector subject to the requirements of G. L. c. 93, § 24, the Massachusetts Fair Debt Collection Practices Act. This claim suffers from the same deficiencies in the record as all of the others. In any event, the judge applied the appropriate analysis of Dorrian v. LVNV Funding, LLC, 479 Mass. 265, 267 (2018), in making her determination that neither of the two definitions of "debt collector" contained in the statute apply to CACH. First, she ruled that CACH "has no contact with

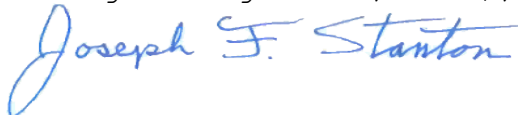
² Fang also argues that the judge's determinations concerning unjust enrichment are erroneous. Given the judge's finding that a contract existed between the parties, and Fang's failure to show that this finding was clearly erroneous, there is no need to reach the judge's alternative disposition, as a claim for unjust enrichment is not available when there is a legal remedy for breach of contract. Santagate v. Tower, 64 Mass. App. Ct. 324, 329 (2005) ("equitable remedy for unjust enrichment is not available to a party with an adequate remedy at law").

consumers and the Legislature did not intend for these entities to be treated as debt collectors under G. L. c. 93, § 24." See Dorrian, supra at 266-267. Second, she ruled that CACH "deals only with its own debts, not the debts of another." See id. at 267.

Finally, Fang claims error in the denial of his motion to reconsider, treated as a motion to alter or amend the judgment pursuant to Mass. R. Civ. P. 59 (e), 365 Mass. 827 (1974). See Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Comm'n, 394 Mass. 233, 237 (1985). Fang's motion simply reiterated his view of the evidence considered by the judge at trial, which is an insufficient basis for a rule 59 (e) motion to "correct judgments which are erroneous because they lack legal or factual justification." Pentucket Manor Chronic Hosp., Inc., supra. There was no error.

Judgment affirmed.

By the Court (Sullivan,
Singh & Englander, JJ.³),



Clerk

Entered: June 28, 2019.

³ The panelists are listed in order of seniority.